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No. 79-1213

IN THE

Supreme Court of the United States

October Term, 1980

WAYNE MINNICK, HENRY J. DARDEN, CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,

Petitioners,

—v.—

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS FIRST APPELLATE DISTRICT—DIVISION FOUR

BRIEF FOR *AMICUS CURIAE* CITY OF DETROIT

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CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

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On Writ of Certiorari to the California Court of Appeals First Appellate District Division Four

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BRIEF FOR AMICUS CURIAE CITY OF DETROIT

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Interest of Amicus *

The City of Detroit, on whose behalf this brief is filed, is a municipality whose law

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* Letters of consent to the filing of this Brief from counsel for the petitioners and respondents have been filed with the Clerk of the Court.

enforcement agencies, particularly its Department of Police, have worked hard to overcome past discrimination against minorities and women, and the debilitating effects that discrimination has had on the ability of the police to operate. The interest of the City of Detroit stems from the fact that it has instituted an affirmative action plan in its Department of Police. The outcome of this case may have a crucial impact on the constitutionality of that plan. Specifically, pending before this Court is a Petition for Writ of Certiorari in a case which raises issues similar to those posed here, namely, whether the City of Detroit's affirmative action plan for the Department of Police is a constitutionally permissible method of overcoming past intentional discrimination and of meeting the compelling operational need of the Department to safeguard the community and to maintain order. Detroit Police Officers Association, et al. v. Coleman A. Young, et al., No. 79-1080. Counsel for the City of Detroit are attorneys employed by the NAACP Legal Defense and Educational Fund, Inc.

SUMMARY OF ARGUMENT

The threshold problem posed by this case is to determine what race-conscious practices respondents actually utilized. The parties are in disagreement about this, and the courts below made few relevant findings. Because of the fragmented and confusing nature of the record, we have described its contents in detail. In awarding promotions respondents did consider the race and sex of applicants, but only if both (a) the minority or female was as qualified as the best qualified white or male, and (b) there was in fact an operational need for a minority or female in the particular position to be filled. The record does not support petitioners' claim that respondents reserved certain positions for minorities or women.

Department of Corrections officials reasonably concluded that there was a critical need for minority corrections officers. Wardens and superintendents from six California penal institutions, together with the present and past directors of the Department, stated that significant

numbers of minority officers were required to maintain control of the prisons. Every year from 1970 to 1974 an average of 25 inmates or guards were being killed in California's prisons, and much of this violence was racial. To a substantial degree this dangerous racial atmosphere had been caused by overt discrimination and bigotry on the part of white guards. Experience demonstrated that minority officers were essential for avoiding or controlling race riots and other racial incidents. Minority officers were also better able to establish the sort of constructive relationships with minority inmates necessary for maintaining control of the institutions.

The Department of Corrections also adopted its affirmative action policies to overcome the effects of past discrimination against minorities and women in hiring and promotion. Counsel for respondents expressly raised this issue at trial and offered substantial evidence that such discrimination had been serious and widespread.

ARGUMENT

I. THE QUESTIONS PRESENTED BY RESPONDENTS' ACTUAL EMPLOYMENT PRACTICES ARE NOT THE QUESTIONS ASSERTED BY PETITIONERS.

This case presents at the outset a critical problem not posed to a significant degree by the affirmative action cases which this Court has considered in the past. Here, unlike Defunis v. Odegaard, 416 U.S. 312 (1974); Regents of the University of California v. Bakke, 438 U.S. 265 (1978); United Steelworkers of America v. Weber, 443 U.S. 193 (1979) and Fullilove v. Klutznick, ___ U.S. ___, 65 L.Ed.2d 902 (1980), there is a basic and largely unresolved dispute between the parties as to what practices the Department of Corrections actually engaged in under the rubric of affirmative action. The findings of the courts below are of only limited assistance in resolving that issue. The trial court held little more than that there were "preferences" and "discrimination" (Petition, E-2, F-4). The court of appeals noted, but did not pass on, the conflicts in the evidence (id., A-6), and summarized some of the evidence without attempting to distinguish between practices

which implemented the respondents' affirmative action policy and those which violated it (Petition, A-6, A-7).

The petitioners create the impression that specific positions were frequently set aside for minorities or women (Brief for Petitioners, pp. 6-9) and that whenever this was not done, preferences were given to minorities or women who were "substantially" less qualified than competing white males (id. p. 10). The "drastic degree" of these preferences, petitioners assert, is illustrated by what they say is a statement by the Department's Director that "white males would have to wait at least five years to get a promotion" (id., p. 11) (emphasis in original). Not only is there a dispute as to whether the statement was in fact made, but there is no proof of any such delay in the promotion of white applicants. Director Enomoto firmly denied having said that no white males would be promoted for five years (R.T. 284-285),[1/] and his denial was supported by several witnesses.[2/]

1/ "R.T." refers to the reporter's transcript of the trial. "C.T." refers to the clerk's transcript.

2/ R.T. 378, 450. Mr. Minnick, whose testimony

Our review of the record indicates that the Department of Corrections' actual practices bear little resemblance to the picture painted by petitioners. The Department of Corrections, far from excluding white males from promotion, awarded more promotions to that group than to any other;[3/] between half and two-thirds of all those promoted under the Affirmative Action Plan were white and about the same proportion were men (see n. 3, supra).

Because the evidence regarding the Department's actual employment practices is complex and conflicting, and scattered throughout the record, we summarize it in detail.

2/ continued

is cited in this regard by petitioners, asserted only that Enomoto stated increased competition would reduce the number of white males receiving promotions, R.T. 46, and then equivocated about remembering even that. R.T. 47. Only Harry LaFayette alleged Minnick had made the statement asserted in Petitioners' Brief. R.T. 25-26.

3/ Exhibit K, Table 3 (white males received 33% of promotions in the first quarter of 1975); Exhibit L, "Sex and Ethnic Origins of CDC Personnel Promotions" (white males received 41% of

A. Hiring

The critical issue posed by the Department's hiring practices is not what type of special consideration was afforded to minority or female applicants, but whether such consideration was extended at all. Both the complaint and the trial court opinion refer to discrimination in "hiring and promotion",[4/] without distinguishing these two types of employment practices. The detailed allegations regarding the named plaintiffs, however, concerned their unsuccessful applications for promotions (C.T. 7-11), and most of the evidence offered at trial was about promotional practices. The trial court made no detailed findings regarding hiring discrimination.

On appeal the state court of appeals apparently believed that some form of preference had been extended to women and minorites seeking

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3/ continued

promotions in the second quarter of 1975); Exhibit D (in 1975 white males received 66% of all promotions to Correctional Program Supervisor III, and 75% of all promotions to Correctional Program Supervisor II); R.T. 379,381,679.

4/ C.T. 63-82; Petition, E-2, F-4.

promotions, but concluded otherwise regarding hiring. Concerning both women and minorities the appellate court held:

> The exercise of "preference" in their favor in recent years, as described above, was limited to cases involving the promotion, transfer, or work assignments of employees only. There was no substantial evidence of any instance in which it had been exercised in the "initial hiring" of a new employee (Petition, A-7 to A-8).

Referring to the trial court's holding on this subject, the court of appeals stated:

> According to our review of the evidence, it does not support a finding that "preferences result" from the practices in... the "hiring" of employees (id., A-17).

The record fully supports this decision, demonstrating that the key method utilized to increase the hiring of minorities and women was recruiting.[5/] Petitioner sought review of the court of appeals opinion by the state supreme court, but not on this issue.[6/]

5/ R.T. 381, 447, 461, 486, 547, 570; Exhibit C, Appendix B, p. 22, Appendix D, p. C-24; Exhibit G, pp. 1, 6, 7, 8, 11, 15, 16, 41; Exhibit Q, p. 2.

6/ Plaintiffs' Petition for a Hearing by the Supreme Court, pp. 2-3.

The Petition to this Court neither referred to nor complained of the state court finding that no preferences had been extended with regard to hiring. See Petition, pp. 12-13. The Petition sought review of only two aspects of the court of appeals decision: its holding that employment preferences were legally permissible, and its finding of a compelling state interest. Id., p. 3. Neither the Petition nor Petitioners' brief challenges or mentions the factual finding by the California appellate court with regard to hiring.

Under these circumstances, we doubt whether the questions presented by this case reasonably encompass a challenge to the court of appeals finding that there were no preferences in hiring. Since certiorari was granted to decide legal issues presented by respondents' promotional practices, no reason appears to depart from the usual rule that only "questions set forth in the petition or fairly included therein will be considered by the Court." Rule 21.1 (a).

Moreover, none of the petitioners has standing to challenge the respondents' hiring practices. The individual plaintiffs are both already

employed by the Department;[7] neither has been denied a promotion or been otherwise personally injured by the challenged policies (R.T. 921), and neither has alleged the type of harm that would have brought him within Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). The California Correctional Officers Association ("CCOA") is an organization of Department employees, all of whom have already been hired.[8] The plaintiffs sought certification of this case as a class action, which might have obviated the standing problem, but certification was denied and no appeal was taken from that denial. Therefore, they are in essentially the same posture as the plaintiffs in East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977). That is, as persons who have not been injured in any way by any of the Department of Correction's employment policies, they may not represent persons who claim such injury. CCOA says it is injured by the Department's practices because CCOA is "an organi-

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7/ First Amended Complaint, p. 2; C.T. 64.

8/ First Amended Complaint, p. 3; C.T. 65.

zation actively opposed to racism and sexism".[9/] But this Court has clearly held that such allegations do not establish an interest sufficient to give standing. Sierra Club v. Morton, 405 U.S. 727, 734-740 (1972).

The California court of appeals expressed serious reservations about the petitioners' standing to maintain this action. Petition, A-23. Even if, however, the interest of the petitioners was sufficient to provide them with standing before a California court, this Court can only exercise jurisdiction over a dispute which meets the requirements of Article III of the Constitution. Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., in chambers). Any dispute about the respondents' hiring practices does not meet those requirements.

9/ First Amended Complaint, p. 11; C.T. 73.

B. Promotions

Ascertaining the nature of the Department's promotional process is complicated by the size and nature of that agency. Unlike the admissions decisions in Regents of the University of California v. Bakke, supra, these decisions are not made by a single individual or group acting on an agreed upon and mechanically applied rule. Most promotions in the Department of Corrections are made by individual supervisors in 12 institutions, four parole regions, and a central headquarters. While most promotions are made under this decentralized system, the promotions of the highest officials in each institution and region are made by the Director of the Department, in light of, but not necessarily following, the recommendations of the supervisors who are immediately concerned (R.T. 306-08). Several hundred positions around the state are apparently filled in this manner.

Affirmative action within the Department did not begin with the 1974 affirmative action plan, and that plan has not remained unchanged. Affirmative efforts to hire and promote women and minorities commenced in 1968 or 1969 at the

direction of then Director R.K. Procunier.[10/] Although minority employment in the Department of Corrections had remained at about 9% from 1963 through 1968, after 1968 it rose steadily at a rate of about 175 employees a year, reaching 19.8% of the work force in 1973.[11/] The actions initiated by Procunier, however, were never set out in a formal, written plan. The original written plan at issue in this case was issued on July 1, 1974 (Exhibit G, p.48). That plan was subsequently revised on April 1, 1975, and on April 1, 1979.[12/] The adoption of this written plan did not increase the ratio at which minority employment had risen at the Department: minorities rose from 9% to 19.8% in the 5 years prior to 1973, an average of 2.2% a year, and from 19.8% to 27.6% in the 6 years since 1973,[13/] an average of only 1.3% a year.

10/ Exhibit Q, p.1; C.T. 702-711, Declaration of R.K. Procunier, pp. 1-10.

11/ C.T. 983-995, Exhibits A-C to Declaration of Mary Van Schaik.

12/ A copy of the 1979 plan has been lodged with the clerk.

13/ See id., table following p. 32.

The critical factual issue is what steps the Department of Corrections is taking to bring about the increase of minorities and women in various positions within the system. The record contains two documents apparently widely distributed within the Department which set forth the official policies and required practices of the Department -- the Affirmative Action Plan (Exhibit G) and portions of a training manual (Exhibit 34). Petitioners have no objections to the provisions of these documents, which call for a policy of equal employment opportunities, the establishment of committees to identify and resolve problems of discrimination, mechanisms to recruit and train minorities and women, periodic reports of personnel actions, etc.

The plan also establishes "goals", or desired levels of minority and female employment (Exhibit G, pp. 11-13), but does not direct Department officials to take any particular steps to realize those goals other than the apparently unobjectionable measures described above.

In addition to the specific steps required by the written Plan, it is clear from the record that there was a practice, both authorized (R.T. 382) and personally implemented (R.T. 289 et seq., 373)

by the Director, of considering under certain circumstances, and to a limited degree, the race or sex of an individual seeking a promotion.

Race or sex was only taken into account if two specific circumstances were present. First, the minority or female applicant had to be as qualified as[14/] or "reasonably equally qualified" to the highest ranking white or male applicant.[15/] If one applicant was significantly better qualified than the others, he or she was given the promotion regardless of race or sex.[16/] Second,

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14/ R.T. 195, 197, 201, 215, 333, 454, 592, 600.

15/ R.T. 183, 185, 203, 204, 289, 304-6, 312, 374,381. One witness used both phrases. Compare R.T. 183-5 with R.T. 195-7.

16/ R.T. 200, 201, 209, 210, 312, 558, 697. Petitioners quote at length from the deposition of Ms. Roby-Stevens, Assistant Director for Women's Affairs, where she stated that a female might be appointed though "substantially" less qualified than a male applicant. R.T. 113. At trial, however, she insisted that she was mistaken, and had misunderstood the Director's policy. R.T. 183, 188, 194-195, 201, 203-204, 208-210. It is clear from the record that the Director, not Ms. Roby-Stevens, actually made the decisions regarding promotions. R.T. 360. The Director made clear that race and sex would not matter if there was a substantial difference in qualifications. R.T. 312.

there had to be an operational need for a person of a particular race or sex to occupy a specific job at a particular institution.[17] Because both the comparative abilities of applicants and the operational needs of particular institutions varied widely, so did the promotion rates.[18]

17/ R.T. 196 (relevance of race or sex depends on "the needs of the department"), 215 (Mexican-American applicant who spoke Spanish seeking a position at an institution with "large numbers of Latinos and Mexican-Americans"), 227 (black applicant for a position at "an institution with 60% black population and hardly any blacks at all on the staff"), 309 (importance of applicant's race depends on "the racial composition of the work force at the particular institution that had a vacancy"), 333 (preference for Latino or Chicano applicant only if "there was a need ... at the particular institution"), 373 (race a factor for "a job in the Department area where we need minorities"), 374 (choice among equally-qualified white, black, and Mexican-American applicants would "depend on where we are going to place the individual"). See also R.T. 376-77, 383, 488, 605, 670, 671.

18/ For example, in the first quarter of 1976, minority men received 18% of the promotions at penal institutions, 42% of the promotions among parole officers, and 0% of the promotions at the central office. Exhibit K, "CDC Promotions."

At times this practice was paraphrased by stating that being a woman or member of a minority group might add to one's qualifications for a particular job, though only by enough to affect the outcome in a close case.[19/] Department officials were sensitive to the possibility that the ability of a black guard to deal effectively with black inmates varied from applicant to applicant.[20/] They also were willing to recognize, and regard as a special qualification, a white applicant's particular ability to work with minority inmates (R.T. 453).

The petitioners maintain that this practice violated both the Constitution and federal law, and the state trial court so held. Whether that practice is indeed unlawful constitutes the central issue in this case. Petitioners also assert that over and above this practice, the Department of Corrections had a policy of setting aside specific positions for minority or women applicants only. In our view of the law, the

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19/ R.T. 383, 667-68, 672.

20/ R.T. 314. See also id. at 453 (not all Chicanos are bilingual), 387, 597.

the existence of such an additional practice would not be of controlling significance. We recognize, however, that under the standards announced by some members of the Court, such a practice might raise other and more difficult issues. Accordingly, we have reviewed the record to ascertain whether it supports petitioners' assertion that certain jobs were reserved for minorities or women. We conclude that it does not.

The record reveals two instances in which officials at particular prisons asked state officials to certify that four particular openings required a female employee (Exhibits 24, 25). This occurred pursuant to a practice which long predated the affirmative action activities (R.T. 70-71, 258) under which particular jobs could be so limited to men or women. Such certifications required the express approval of the State Personnel Board (R.T. 698), and Department of Corrections officials testified that the Department sought to minimize the use of such restrictive certifications (id.) The record also contains a request that a particular position be certified as "bilingual" (Exhibit 8), although it is not clear who could grant this sort of certification.

These certifications, had they all been granted, would have affected only 5 of the more than 8,000 positions within the Department of Corrections. In fact, however, there is no evidence that any of the requested certifications were ever issued. Moreover, petitioners have expressly disavowed any opposition to "female only" or "male only" certifications at institutions with female and male inmates respectively,[21/] and have not indicated opposition in principle to a requirement that a particular position be filled by a Spanish-speaking officer, so long as Spanish-speaking Anglos were also considered. The mere fact that in the past a handful of certifications were requested is insufficient to establish that there was an affirmative action policy of reserving particular jobs for women or minorities.

There were, as well, three isolated instances in which job announcements stated that particular

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21/ One of CCOA's officials testified, "[W]e find significant justification in a female sent to work at CIW in a women's dormitory or in a position where one would necessarily have to supervise women's activity in the shower, lavatory, things of that nature." R.T. 71; see also Plaintiffs' Post Trial Brief, p. 41; C.T. 364.

openings were limited to minorities or women.[22] The record makes clear, however, that these incidents were not within the scope of the Affirmative Action Plan, and that Departmental authorities took effective action to prevent their recurrence. Two of these annoncements were issued at about the same time by a single personnel official at one prison. In response to a complaint about one of these announcements, the Department stated that future announcements would not be so restricted;[23] the personnel officer involved was admonished not to do so again, and did not.[24] A second official at a different institution testified that a restriction in an announcement she had issued was a

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22/ Exhibits 11,12,13. The record also contains such an announcement from the Board of Corrections, Exhibit 6. The Board, however, is not part of the Department of Corrections. R.T. 83.

23/ Exhibit 11. At trial, petitioners maintained that the particular announcement had reflected Departmental policy, but acknowledged that in response to the complaint, the Department decided to "change its position". R.T. 97. Any such change in position occurred in February, 1975, 10 months before this action commenced.

24/ R.T. 100; see Exhibit 13.

mistake.[25] These three incidents involved two unrelated individuals, acting from no common plan or design, at two different institutions. They occurred within the first five months of the issuance of the Affirmative Action Plan and, if indeed causally related to that plan, were promptly recognized as not being authorized by it. The last of these incidents occurred 11 months before the complaint in this action was filed. Far from proving that the Department had a policy of reserving particular positions for women or minorities, these events indicate that the contrary was the case.

Petitioners also called as witnesses individuals who claimed that they had been denied promotions because they were white males and alleged in some instances that positions were being reserved for minorities or women (R.T. 6-64, 117-57). Their testimony was specifically rebutted by a series of defense witnesses[26]; in at least two instances the jobs being sought by

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25/ R.T. 99; see Exhibit 12.

26/ R.T. 432-80 (regarding the named plaintiffs and complaining witness from Susanville), 503-08 (regarding Tommy Simpson), 530-35, 539-42, 577-78 (regarding George Thomas).

these complaining witnesses had in fact been filled by white males.[27] The trial judge concluded that none of these individuals had been denied the positions in question because of their race or sex (R.T. 921), and no appeal was taken from that decision. One other witness, Jack Mayo, testified that he believed he was required to interview only minorities for positions within his unit, and that he had done so.[28] Mayo's supervisors, however, made clear that they regarded Mayo's view of his responsibilities as mistaken, and that when they learned of it, they instructed him to interview all applicants, regardless of race or sex.[29] Counsel for petitioners conceded at trial that Mayo had been directed to stop telling whites that they would not be considered (R.T. 811).

27/ R.T. 494, 507. During the second quarter of 1976 all seven promotions at Susanville were awarded to whites. Exhibit 32.

28/ R.T. 709-733; Exhibit M.

29/ R.T. 773, 776, 777, 798-9, 800-01. See also R.T. 684-87. Prior to this incident, all of the 15 or 16 employees who worked for Mayo were white, R.T. 774, and Mayo's superiors believed that he had intentionally discriminated against minorities. R.T. 774,798.

Although the written Affirmative Action Plan sets certain goals for minority and female employment, 36% minorities and 38% women, these goals appear to be of little operational importance. There clearly is not a numerical quota; no fixed portion of promotions is set aside for either women or minorities. Petition, A-16. Although, in a close case, Departmental officials may consider whether there is an operational need for a member of a minority group or woman in a particular position, their testimony does not indicate that this assessment of these needs follows from any mechanical calculation. See n. 17, supra. The primary significance of these goals is that they provide a method by which personnel officials in Sacramento identify institutions where there may be problems.30/ Although the plan hoped for achievement of these goals by 1979, the Department obviously did not believe that deadline had to be met, regardless of how drastic the necessary measures; as early as January, 1975, correctional officials concluded that the goals would in fact not be met until at

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30/ Exhibit K, "Quarterly Management Review."

least 1983,[31/] and the record reveals no change in practices occasioned by this realization. The plan was revised and extended an additional five years in 1979.

In sum, while the record demonstrates that Departmental officials do at times consider the race or sex of applicants for promotion, this occurs as a rule only when there are no significant differences in their qualifications, and when the race or sex of an applicant would in fact affect his or her ability to perform the job at issue. The Department did not set aside specific jobs for women or minorities.

II. RESPONDENTS' PRACTICES ARE NECESSARY TO MAINTAIN SECURITY AT CALIFORNIA'S CORRECTIONAL INSTITUTIONS.

The affirmative action cases previously before this Court have involved public policies in a variety of important areas -- education,

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31/ See Exhibit K, "California Department of Corrections, Projection for Attainment of CDC Affirmative Action Goals."

employment, and the construction of public works. This case, however, concerns the most fundamental of all governmental functions, the preservation of order and the protection of individuals from criminal violence. In the allocation of jobs or college admissions the consequences of error are important but rarely catastrophic. Under such circumstances some members of this Court have held it is appropriate to scrutinize official decisions predicated on operational needs and the availability of alternative solutions. In this case the California Department of Corrections concluded that certain affirmative action policies were essential to the security of its correctional institutions. Any judicial decision interfering with those policies could have severe consequences.

The problems which led to the adoption of the Department's affirmative action policies were grave. There was "more violence and killing in California's prisons than in any other state system. In the four years prior to 1974, 400 inmates and staff ha[d] been wounded, and almost 100 killed."[32/] That homicide rate represented a

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32/ Serrill, "Profile/California", 1 Corrections Magazine, No. 1, (Sept. 1974), p. 3.

400% increase over the rate prevalent in the mid-sixties (C.T. 746). In 1970-71 alone nine correctional officers and twenty-eight inmates were killed (C.T. 703) compared to only four employee homicides in the previous 17 years.[33/] In 1975, in San Quentin alone, there were five murders (R.T. 489).

An increasing number of these violent incidents were racial in nature. A State Task Force to Study Violence in Prisons reported that between 1963 and 1964 the proportion of such incidents caused by racial hostilities jumped from 7.1% to 15.3% (C.T. 750). By 1973 about 29% of all stabbings were racial in origin.[34/] The record described racially-based assaults or murders at correctional institutions at San Quentin (C.T. 703), San Luis Obispo (id.), Soledad (C.T. 504; R.T. 559), Jamestown (C.T. 494-95, 560), and Folsom (C.T. 703). The racial atmosphere in many institutions was explosive.

33/ Procunier, "The Dilemma of Prisons", National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 19.

34/ Exhibit C, Appendix C, Chart No. 7.

> Most inmates in prisons such as Soledad and San Quentin [were] prejudiced against prisoners of other races....Many of the correctional officers exhibited little sympathy or understanding towards minority inmates and frequently made racial slurs and openly told offensive ethnic jokes (C.T. 501).

In many such institutions the inmates were organized into racial gangs, particularly the Aryan Brotherhood, the Black Guerilla Family, the Mexican Mafia and Nuestra Familia.[35/] In at least six facilities inmates of one race refused to associate with inmates of other races, segregating themselves in dining halls, movies, the recreation yard, or other locations.[36/] At one prison the mere "sight of a white officer stopping a Black inmate would often cause other Blacks to congregate in the vicinity, and would thus create

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35/ R.T. 340, 476, 559-60, 642; C.T. 561.

36/ C.T. 789; R.T. 899 ("If a new guy comes into the penitentiary, see, and him and a white guy, they may have been friends on the streets, and like if they start eating together, well, then peer group will put pressure on them to make them stop. And I've seen this happen many times, you know").

a volatile atmosphere".[37]

This explosive and at times lethal situation had many causes, but one of them was clearly racial discrimination on the part of the virtually all-white correctional staff. Following a race riot at San Quentin, a correctional official there reported that the riot arose out of a pattern of discrimination and segregation.[38] Racial slurs against minority inmates were common;[39] they were openly referred to by the white guards as "niggers", "boy", "buckwheat" and "coon".[40] Minority inmates were relegated to menial jobs or those with limited potential outside the prison, and only white inmates were hired as clerks.[41] Discrimination existed in

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37/ C.T. 541.

38/ C.T. 827 ("In almost every area of prison life, there is one standard for white inmates and another for Negro inmates"). See also C.T. 704-05; Serrill, "Profile/California", 1 Corrections Magazine, No. 1, (Sept. 1974), pp. 3, 31.

39/ C.T. 785, 938.

40/ C.T. 827, 864, 873, 926, 930.

41/ C.T. 705, 776, 852, 860.

both vocational education[42/] and the allocation of desirable cells.[43/] Racism by white correctional officers against minority officers was virulent and contributed to racial tension. Slurs against minority staff[44/] in the presence of white inmates encouraged white inmates to adopt the same attitudes (C.T. 927). Minority inmates were also aware of the manner in which minority officers were treated and saw it as a reflection of the discrimination in the prison system. C.T. 931. Not surprisingly, the systemic discrimination against minority inmates and staff reinforced racial hostilities. The Marin County Grand Jury, after investigating the San Quentin riot, reported that

> Racist attitudes on the part of custodial personnel pervade the department so as to become the rule and not the exception. In the tinderbox environment of San Quentin, racial epithets, especially by prison personnel, are a sure cause of tension, irritability, and violence. There is no doubt in the mind of this Grand Jury that virtual institutionalization of overt racism has been the direct cause of countless serious injuries to both prisoners and staff alike ... (C.T. 920).

42/ C.T. 705, 778, 852.

43/ C.T. 705, 970.

44/ C.T. 864, 873, 926, 930.

A task force established to investigate the San Quentin riot urged the Department to take steps to increase the number of minority group employees (C.T. 704). The initial affirmative action policies were adopted in response to this proposal (id.). In May, 1974, a subsequent Task Force to Study Violence urged renewed efforts to increase minority employment, arguing that increasing the proportions of Black and Chicano employees will relieve although not solve the problems.[45/] Acting in part in reliance on the latter report the Director of the Department issued the written Affirmative Action Plan which is under attack in this case (R.T. 325).

Department officials have concluded that the presence of minority employees is essential in a variety of ways to the maintenance of security. The most dangerous role for which those employees are needed is to help control and prevent race riots and other racial incidents among the inmates or between inmates and guards.[46/] The importance

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45/ The Task Force to Study Violence, Report and Recommendations, (May, 1974), p. 1, p. 20.

46/ With respect to another law enforcement branch, the police, the presence of black of-

of minority guards was graphically illustrated by the testimony of a black former guard who averted bloodshed in the wake of a near riot in the Big Yard at San Quentin in 1971. After black and white inmates were physically separated, the white Yard Lieutenant directed the black inmates to return to their cells. They refused to do so, and defied the white officer to come closer to them; he refused to do so, and called instead for guns and tear gas. At that point, a black guard was called in and, by merely reasoning with the black inmates, was able to end the confrontation. He testified:

> A. There was no violence then, no... But I am saying by me being black, I had a little -- I had that extra going for me because they wouldn't arbitrarily attack me .... If that other [white] Lieutenant would have gone up there, I'm quite sure they would

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46/ continued

ficers, particularly supervisors, has been considered important in controlling and easing tensions during potential racial confrontations. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967), pp. 1, 172; Report of the National Advisory Commission on Civil Disorders (1968) pp. 1, 315.

have attacked him. 47/

The record contains other examples of how minority guards were able to avert racial violence,48/ and how the lack of black officers hampered the Department's ability to deal effectively with racial disturbances (C.T. 494-95).

However, the importance of minority officers is not limited to extreme situations. Under normal circumstances guards are constantly at risk. With rare exceptions, guards do not carry firearms,49/ and frequently they are surrounded by hundreds of inmates, many of whom "have demonstrated a capacity for violence". Pell v. Procunier, 417 U.S. 817, 826 (1974). There is a danger, as one former guard testified, that "[o]ut of frustration, your color gets you killed, you know, just for no reason." (R.T. 896).

Under these "ordinary" circumstances corrections officials maintain control of their institutions, not by force of arms or by intimidation

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47/ R.T. 897. This white Lieutenant ordinarily had excellent relations with black inmates. R.T. 900-901.

48/ R.T. 551, 663; C.T. 503-04, 525.

49/ R.T. 336, 623.

and threats, but through an effective and cooperative relationship with the inmates. "[T]he operation of a prison facility depends upon the ability of the staff to interact with the inmates and to come to some common agreement as to how the activity should be conducted" (R.T. 621). The most important qualification a correction officer must have is the "ability to effectively communicate. Not only to be able to perceive what is going around him or her in the institution, but to be able to diffuse potentially dangerous or tense situations."50/

The California Department of Corrections concluded that minority officers were likely to communicate more effectively with minority inmates. This view was shared by the wardens of Folsom and San Quentin prisons (R.T. 445; C.T. 500-02), the supervisors of institutions at Soledad, Deuel and Jamestown (C.T. 509-10, 541-42, 494-96), the Director and Personnel Director of the Department (R.T. 322-23, 324, 343-44, 676), and other high ranking state corrections officials (R.T. 550, 591, 596-97,

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50/ R.T. 676; see R.T. 336, 624, C.T. 496.

563). As the Director explained:

> I do believe, on the basis of my experience in this business, that generally speaking when you're dealing with groups of black inmates in a prison, generally speaking, the black correctional officer would generally have a better chance of being accepted and of dealing with and relating to those black inmates than any other ethnic group (R.T. 343-44).

Their shared history as victims of societal discrimination affords a potential bond between Black or Mexican-American inmates and guards that could prove critical at times of strife (C.T. 502). State officials also recognized that a white officer might be literally unable to understand Mexican-American inmates, many of whom speak only Spanish;[51/] similar concerns were expressed about the use of ghetto dialect on the part of black inmates (R.T. 654-55, 895, 904).

Correctional officials also found that minority officers were likely to be essential in conducting investigations of incidents or criminal conduct within a facility when one or more of the

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51/ R.T. 321, 479, 625, 662; C.T. 526.

witnesses were non-white.[52/] The role of minority supervisors in shaping institutional policies had proved critical to avoiding decisions likely to provoke racial difficulties, and to ascertaining steps tending to improve the racial atmosphere (C.T. 504-05, 510-13, R.T. 627).

The necessity for minority officers reaches to all levels of the prisons. The presence of minority supervisors prevents the implementation of policies which inflame racial antagonisms (C.T. 504), and affects decisions which affirmatively improve racial understandings and the feeling among minority inmates that the administration has abandoned its discriminatory practices and has begun to treat all inmates fairly (e.g., C.T. 510-11). Having minorities in supervisory roles also insures the elimination of specific discriminatory practices, as in inmate work assignments (C.T. 526). As the Association of State Correctional Administrators has recognized,

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52/ R.T. 562; C.T. 502 ("[s]hould a black and white inmate be involved in a racial assault, it is extraordinarily helpful for the white inmates to be interviewed by a white staff member and a black by a black "), 509.

there is a "clear need to increase the number of minority personnel at every level of corrections ..." Uniform Correctional Policies and Procedures (1972), pp. 22-24.[53/]

To characterize the Department's Affirmative Action Plan as pandering to inmates' "customer preference"--as in cases in which airlines argued that their predominantly male passengers preferred female flight attendents--trivializes a serious problem of institutional and individual security to the point of absurdity. First of all, unlike the male airline passenger's predilictions, minority inmates' distrust of white officers is grounded in a very real history of overt racist conduct. In the context of a similar argument

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53/ Accord, National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973) p. 1, pp. 474, 599; Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972) p. 1, pp. 23-24; National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8), 1971), p. 19, pp. 50, 85, 91, 92; Final Report of Joint Commission on Correctional Manpower and Training, A Time To Act, (October 1969), p. 1, p. 14; Skoler and Loewenstein, Minorities in Correction, Nondiscrimination, Equal Opportunity and Legal Issues, 20 Crime and Delinquency, N. 4, (Oct. 1974), p. 339, p. 340.

made by white police officers against the Detroit Police Department's affirmative action plan, Judge Damon Keith noted:

> The City's operational needs defense cannot be separated from the historical context in which it arose. In an ideal world there is no question that the operational needs defense would be untenable. However, we do not live in an ideal world, and the history of race relations in the City of Detroit is far from ideal.

Baker v. City of Detroit, 483 F. Supp. 933, 996 (E.D. Mich. 1979).

Secondly, the experience in California's prisons and elsewhere has been that the presence of more minority correctional officers does in fact facilitate communication and cooperation between inmates and staff, does in fact reduce racial tensions, and does in fact avert violence and assaults. "[I]n the current environment, where prison disruption remains a serious concern to administrators," this Court has not "ignore[d] the desire and effort of many states . . . to avoid situations that may trigger deep emotions" and violence. Wolff v. McDonnell, supra, 418 U.S. at 568.

Finally, the affirmative action program was not instituted because black inmates only like black guards (R.T. 338-39). The trial court itself recognized that minority and female employees were indeed needed in certain positions, and approved assignments on the basis of race and sex. Petition, F-6 to F-7.

To a substantial degree, the purposes served by minority employees require that they be at all levels of the Department, not merely in the lowest ranking positions. The Law Enforcement Assistance Administration initially urged as a guideline that the proportion of minority employees be 70% of the proportion of minority inmates. Exhibit G. In 1976, after LEAA withdrew the use of the proportion of minority inmates as a standard, California officials, drawing on four years of experience under the Affirmative Action Plan, decided to continue this guideline. Petitioners did not raise as an issue or seek to prove at trial that the number of minority and female employees was already sufficient to meet the Department's operational needs, or that the 70% guideline was too high; they urged instead simply that there were no such operational needs. Their claim in

this Court that there were ample minority employees when the plan was adopted is clearly not supported by the record.[54/]

These judgments on the part of California officials, and the affirmative action policies adopted by the California Department of Corrections, were not unique. Racial violence in prisons is a nationwide problem;[55/] and correctional administrators and experts have looked closely at the interaction between staff and inmates as the key in diffusing the tension.[56/] The New York

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54/ For example, among 25 top administrators, 31 teacher supervisors, 61 psychiatrists, 37 chaplains and 33 Correction Counsellor III's, there was not a single Mexican-American. There was only one Mexican American among 65 academic teachers, among 33 Correction Counsellor II's, among 36 psychiatrists, and among 36 deputy or associate administrators. Exhibit G, p. 34.

55/ Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972) p. 1, pp. 22-24; National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, (1973), p 1, p. 465.

56/ Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972), p. 1, pp. 22-24; National

commission investigating the Attica tragedy found its roots in the absence of minority guards and in racial discrimination on the part of white corrections officers.[57] Correctional administrators,[58]

56/ continued

Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, (1973) p. 1, pp. 363, 365; National Conference on Corrections, Williamsburg, Virginia (Dec. 5-8, 1971), p. 50; Attica, The Official Report of the New York State Commission on Attica (hereinafter referred to as McKay Commission Report), preface XVIII, pp. 3, 4, 79-82, 112, 113.

57/ McKay Commission Report, p. 1, pp. 2-4, 38-40, 80, (Bantam Ed., 1972).

58/ Association of State Correctional Administrators, Uniform Correctional Policies and Procedures, (1972), p. 1, pp. 23-24; Procunier, "The Dilemma of Prisons", National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 19, p. 20; Manpower for Corrections, Group Discussion Papers, Workshop II, National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 83 (McLaughlin), 91 (Breed), 92 (Luger), 93 (Wallace), 93-95 (Nagel), 96-97 (Sanfilippo), 103 (Oswald); The Task Force to Study Violence, Report and Recommendations, (May 1974), p. 1., p. 20.

experts in the field,[59] Congress,[60] and a

59/ Higginbotham, J., "From the Outside Looking In: Is Yesterday's Racism Relevant to Today's Corrections?", Outside Looking In, A Series of Monographs Assessing the Effectiveness of Corrections, Law Enforcement Assistance Administration, U.S. Department of Justice, (April 1970); Skoler and Loewenstein, Minorities in Correction, Nondiscrimination, Equal Opportunity and Legal Issues, 20 Crime and Delinquency, No. 4, (Oct. 1974), p. 339, 340; Mitchell, "New Doors, Not Old Walls," National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 5, p. 8; McGee, "Manpower For Corrections, Summary of Workshop II Reports," National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p.49, p. 50; Kutak, "New Directions in Corrections, Summary of Workshop III Reports," National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 52, p. 53; Manpower for Corrections, Group Discussion Papers, Workshop II, National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971) p. 83, pp. 83, 84 (Moeller), 85 (Conrad).

60/ American Prisons In Turmoil, Hearings before the House Select Committee on Crime, 92nd Cong., 1st and 2nd Sess., (1971 and 1972), p. 1, pp. 8, 21, 22, 40, 41, 58, 59, 80, 81, 140-43, 148, 149, 154-57, 168, 169, 224, 227, 318, 319; Pepper, Prisons In Turmoil, 36 Federal Probation, No. 4, (Dec. 1972), p. 3, p. 4.

series of national commissions[61/] have consistently urged that the number of minority correctional employees be sharply increased. The Report on Corrections of the National Advisory Commission on Criminal Justice and Standards recommended that correctional officials "take immediate, affirmative action to recruit and employ minority group individuals."[62/] The Attorney General reported in 1971 that the Federal Bureau of Prisons had a goal of one-third minority employment in all new hiring and strongly supported such efforts, arguing they "would greatly increase the effectiveness of counseling and guidance ... [and]

61/ National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, (1973), p. 1, p. 363, 435, 465, 466, 471, 474, 475, 599; Joint Commission on Correctional Manpower and Training, Corrections, 1968, A Climate For Change, (1968), p. 1, p. 28; Final Report of Joint Commission on Correctional Manpower and Training, A Time To Act, (Oct. 1969), p. 1, p. 76.

62/ National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973), p. 1, p. 474; see also, id. at pp. 363, 435, 465-66, 471, 474-75, 599.

genuinely benefit the corrections process."[63/]

The Fourteenth Amendment does not prevent a state or local government from implementing race-conscious measures to meet a sufficiently important or compelling government interest. Regents of the University of California v. Bakke, supra, 438 U.S. at 362-69 (Opinion of Brennan, White, Marshall, and Blackmun, J J.); id at 310-15 (Opinion of Powell, J.). In Bakke, Justices Brennan, White, Marshall, and Blackmun held that because of the clear and substantial discrimination against minorities in education there was "no question" that the state medical school's affirmative action admissions program was constitutional. Id. at 369. Justice Powell noted that a state's interest in facilitating the health care of its citizens or in attaining a diverse student body in its educational institutions would be sufficiently compelling to support the use of racial classifications. Id. at 310-12. The state's need to maintain security in its prisons is at least as compelling as the governmental interests which were at stake in Bakke.

63/ National Conference on Corrections, Williamsburg, Virginia (Dec. 5-8, 1971), p. 5, p. 8.

In employment discrimination cases, courts have appropriately acknowledged the peculiar needs of governmental law enforcement agencies, as distinguished from private employers, to have minority employees in order to perform their essential functions. Courts have repeatedly determined that, where there is a disproportionately low number of minority police officers compared to the representation of minorities in the population, an increase in the number of minority officers will substantially improve the quality of law enforcement; and accordingly, the courts have taken this factor into account in determining an appropriate remedial order, see, e.g., Bridgeport Guardians Inc v. Bridgeport Civil Service Commission, 482 F.2d 1333, 1341 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); Arnold v. Ballard, 390 F. Supp. 723, 736 (N.D. Ohio 1975), aff'd, 12 FEP Cases 1616 (6th Cir. 1976) vac. and rem. on other grounds, 16 FEP Cases 396 (6th Cir. 1976). In approving an affirmative action remedy for a police department, the Second Circuit emphasized that

> this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a police department and the visibility of the Black patrolman is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement.

Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, supra at 1341. Accord, NAACP v. Allen, supra at 621; Arnold v. Ballard, supra, 390 F. Supp. at 736; Baker v. City of Detroit, supra, 488 F. Supp. at 966-67.

The need to maintain order and security in prisons is essential to the state's job of providing adequate correctional institutions. The record in this case as well as the findings of experts throughout the nation, show that minority correctional officers are an essential component in the maintenance of order. Once, as here, the substantial or compelling government interest is established, the issue becomes whether the affirmative action program at issue is designed to further that interest,[64/] and whether the remedy

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64/ Fullilove, supra, 65 L.Ed.2d at 925-32 (Burger, C.J., joined by White and Powell, JJ.), 937, 945 (Powell, J.); 951-52 (Marshall, J., joined by Brennan and Blackmun, JJ.); Bakke, supra, 438 U.S at 275-76, 317-18 (Powell, J.); 359 (Brennan, White, Marshall, and Blackmun, JJ.).

is tailored "to fit the nature and extent of the ... violation." Dayton Board of Education v. Brinkman, 433 U.S. 406, 419-420 (1977), quoting Milliken v. Bradley, 418 U.S. 717, 738 (1974), cited with approval in Fullilove v. Klutznick, supra, 65 L.Ed.2d at 927.

From the standpoint of operational need, the purpose of the Affirmative Action Plan is not to make victims of past employment discrimination whole. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Rather, the purpose is to undo the debilitating and dangerous effects that past discrimination has had on the ability of the state to maintain order in its prisons. The compelling need to have minority guards visible and available throughout an institution to quell racial tensions and avert violence is directly related to the presence of minority inmates in the prison population. It has little, if any, relationship to the number of minorities in the relevant labor market. In order to tailor a remedy to meet that need, the percentage or number of minority inmates in the prisons is the ideal framework from which to assess the affirma-

tive action plan.[65/]

Courts have an obligation to assess the reasonableness of the parameters of an affirmative action plan. However, in the context of law enforcement agencies, and in prison administration in particular, the precise manner in which the goals of the plan are related to the prison population encompasses complex "considerations [which] are peculiarly within the province and professional expertise of correctional officials." Pell v. Procunier, 417 U.S. 817, 827, (1974) cited in Bell v. Wolfish, 441 U.S. 520, 540, n.23 (1979); See Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977); Procunier v. Martinez, 416 U.S. 396 (1974), see also, Lee v. Washington, 390 U.S at 333, 334 (1968) (Black, Harlan,

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65/ Although there is evidence to support the operational need for women correctional officers (R.T. 445, 485, 555, 583, 594, 611-17; C.T. 505, 511), this Court need not decide whether that need justifies an affirmative action plan for women. The plan's goal for women is tied to the labor force (unlike the goal for minorities, which is tied to the inmate population), and is justified as a means to overcome prior intentional discrimination against women in employment. See Point III, infra.

Stewart, JJ., concurring). The goal in respondents' plan, 70% of the minority inmate population, was one recognized as appropriate by LEAA and explicitly or implicitly approved of by scores of prison authorities.[66/] And as set forth in Point I, supra, the actual practices of respondents were flexible and directly related to promoting qualified members of minority groups and females where they were needed. "Because [these] realities of running a penal institution are complex and difficult," this Court has "recognized the wide-ranging deference to be accorded the decisions of prison administrators." Jones v. North Carolina Prisoners' Union, 433 U.S. at 126.

66/ National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections (1973), p. 1, p. 435; Skoler and Loewenstein, Minorities in Correction, Nondiscrimination, Equal Opportunity and Legal Issues, 20 Crime and Delinquency, No.4, (Oct. 1974), pp. 339, 340; American Prisons In Turmoil Hearings Before the House Select Committee on Crime, 92nd Cong., 1st and 2nd Sess., (1971 and 1972), supra; The Task Force To Study Violence, Report and Recommendations, (May 1974), p. 1, p. 20; McKay Commission Report, pp. 2, 3; McGee, "Manpower For Corrections Summary of Workshop II Reports, National Conference on Corrections, Williamsburg, Virginia, (Dec. 5-8, 1971), p. 49, p. 50.

Counsel for amicus has at times disagreed with this approach.[67/] Nevertheless, the deference historically accorded these governmental officials in the area of prison security should be no different in this context, for the operational reasons prompting the adoption of the Affirmative Action Plan are directly related to maintaining prison security and accordingly the deference that has been given in the past applies with equal force here.

III. RESPONDENTS' PRACTICES ARE JUSTIFIED AS A METHOD OF OVERCOMING THE EFFECTS OF PAST DISCRIMINATION.

Fullilove v. Klutznick, supra, and United Steelworkers of America v. Weber, supra, made clear that an employer can adopt race-conscious policies to redress the effects of past discrimination.[68/] Those holdings provide an alternative

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67/ See, e.g., Brief for Appellees Hillary, et al., Procunier v. Hillary, No. 73-754; Brief Amicus Curiae for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., Bell v. Wolfish, No. 77-1829.

68/ International human rights norms recognize the propriety of affirmative action. The International Convention on the Elimination of All Forms

basis for the affirmative action practices in this case.

As we noted in Point I, supra, affirmative action efforts originated in 1968 when Director Procunier learned that increased racial violence in the prison had its roots in discrimination by white officers. Procunier's investigation revealed that the paucity of minority officers was due to widespread and intentional discrimination against minorities in hiring and promotion (C.T. 704-709). He stated that both the policies initiated in 1968 and the written 1974 plan were "designed in part to bring these discriminatory

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68/ continued

of Racial Discrimination, adopted Dec. 21, 1965, G.A. Res, 2106A, 20 U.N. GAOR, Supp. (No. 14) 47, U.N. Doc. A/1604 (1965), signed by the U.S. on Sept. 28, 1966 [Executive C. 95-2], transmitted to Senate, Feb. 23, 1978, cited in 4 Treaties Pertaining to Human Rights, Message from the Pres. to the Senate, 95th Cong., 2nd Sess., U.S. Gov't Printing Office 1978, provides (Article 1) that: "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups ... shall not be deemed racial discrimination." There is a similar provision for women. Convention on the Elimination of Discrimination Against Women, opened for signature Dec. 18, 1979, U.N. Doc. A. RES/34/180 (1979), signed by the U.S. July 11, 1980.

practices to an end and to undo the effect of these practices over so many years" (C.T. 710). The present Director, Enomoto, corroborated this at trial (see R.T. 338). An assistant director stated that the initiatives taken in 1968 were based on the recognition that "racism, overt and subtle, existed in the Department and to call it that, as opposed to some of the popular euphemisms, and then to try to deal with practical realities" (Exhibit Q, p. 1).

Despite petitioners' assertions to the contrary, counsel for respondents advanced prior discrimination against women and minorities as a justification for the plan, and the trial court made no findings either that the plan had not been adopted to remedy past discrimination or that respondents had not advanced past discrimination as a reason for adopting the plan.[69/]

Indeed, at trial, witnesses repeatedly testified as to the Department's history of discrimination against minorities and women (R.T. 212, 213, 327, 442-43, 871-72). Discrimination in

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69/ Compare Brief for Petitioners, p. 19 with Finding of Fact #13, Petition F-5.

the conduct of oral examinations was cited as a method of excluding minorities, along with testing (R.T. 371-372, 442-43, 824 et seq., 872-30). Until at least 1972 the Department set higher educational requirements for women officers than for men in the same positions, and refused to permit women to hold most positions in male institutions. (R.T. 211, 327, 485, 529; see R.T. 605). On three separate occasions the trial judge indicated that he was persuaded that there had been such discrimination, and he even urged the plaintiffs to stipulate that it had occurred. (R.T. 344, 379-80, 426-27).

Other evidence demonstrated the virulent nature of the Department's past discriminatory practices. Director Procunier explained that the Department had deliberately refused to recruit through minority media, had falsified physical examination records of minorities,[70/] had denied minorities applications and information about upcoming examinations, had intentionally used a

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70/ For example, one black female applicant was told blacks had "bad blood", which was "hereditary syphillis". She submitted to a spinal tap and other tests to show she had no syphilltic traits. C.T. 836.

written test which it had known for years was "discriminatory and culturally biased", had given minorities unwarranted low performance evaluations in order to deny them promotions, and generally had given minorities "a run-around to discourage their applying for employment in the Department" (C.T. 702-709). Procunier's statements were confirmed by correctional officials from facilities throughout the state.

The warden at Folsom participated in interview panels for job applicants where decisions were made not to hire otherwise qualified minority applicants on the ground that minorities were not acceptable in the predominantly white communities where certain prisons were located. C.T. 832. As late as 1974 through 1976, minority officers at Soledad, particularly blacks, received less favorable assignments, and were victims of racial slurs and other abuses (C.T 864, 873). As one white correctional officer admitted:

> Often the harassment was petty in nature; lunches would mysteriously disappear from lunch rooms or be found to contain urine. In other cases, the behavior ran to fundamental issues of effectiveness and prison security, as when white inmates were incited to harass Chicano and black officers (C.T. 873).

The workforce analysis on which the 1974 plan was based showed the extent to which the effects of past discrimination remained. Among security officials and correctional counselors, positions that account for the vast majority of jobs in the institutions, minorities were largely excluded from supervisory roles despite their presence at the lower level positions, as shown by the following table.

Minority Staff,
September, 1973

Correctional Counselors

	Black	Spanish-Surnamed
Correctional Counselor I	9.0%	5.4%
Correctional Counselor II	8.2%	1.4%
Correctional Counselor III	0%	0%

Guards

Correction Officer	11.1%	11.2%	
Correction Sergeant	5.0%	5.5%	
Lieutenant	1.1%	4.3%	
Supervisor, Captain	4.4%	6.4%	71/

71/ Source: Exhibit G, 34.

As of 1974, the proportions of Mexican-American and female employees in the Department were still only half their proportions in the state labor force (Exhibit G, 26-27).

As we demonstrated in Point II, supra, the Department's past discriminatory practices have not only victimized minority applicants and employees but have also contributed to the pervasive climate of racial tension and violence in the state's prisons. The state has a duty to remedy those consequences of its own discriminatory conduct. See, e.g., Milliken v. Bradley, 433 U.S. 267, 281 (1977); Louisiana v. United States, 380 U.S. 145, 154 (1965); Green v. County School Board, 391 U.S. 430, 438 (1968). Whatever rights inmates lose upon entering a prison, they do not relinquish the right to be protected against invidious discrimination on the basis of race under the Equal Protection Clause. Bell v. Wolfish, 441 U.S. 520, 545 (1979); Cruz v. Beto, 405 U.S. 319, 321 (1972); Lee v. Washington, 390 U.S. 333 (1968). Under these circumstances, continued affirmative action was clearly still warranted.

IV. THIS COURT SHOULD CONSIDER ALL EVIDENCE OFFERED IN THE TRIAL COURT.

The evidence in this case was offered in the trial court in three distinct phases. First, the trial itself began less than eight months after the filing of the complaint, and was completed on October 12, 1976. Second, in response to a motion for a preliminary injunction in February, 1977, respondents submitted affidavits of several correctional officials regarding the operational need for minority and female staff (C.T. 494-602). Third, respondents on April 7, 1977, filed a motion to augment the record, to which was annexed affidavits of more than two dozen correctional officials concerning past discrimination in hiring and promotion against minorities and women (C.T. 701-983). The trial court entered its Findings of Fact and Conclusions of Law on October 11, 1977, six months after respondents filed their motion to augment the record.

The trial court, prior to its final decision, denied the motion to augment the record, and petitioners appear to suggest that this Court should

therefore disregard the information contained therein (Brief for Petitioners, 15). The trial court rejected that motion on the ground that such evidence was irrelevant; it expressly rejected petitioners' request that it rule the motion untimely (R.T. 1432-33).

The California court of appeals did not find the proffered evidence irrelevant, but held that the trial court "did not abuse its discretion in denying the motion, which was made by afterthought and much too late "(Petition, A-23). Even had the evidence never been offered in the trial court, however, California law gives an appellate court discretion to consider any new evidence in a non-jury case.[72/] In the resolution of a case of constitutional magnitude, the power of this

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72/ California Code of Civil Procedure, § 909, provides:

> In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make findings of fact contrary to or in addition to those made by the trial court. Such findings may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the

Court is not limited by such exercises of discretion by the state courts below. See Williams v. Georgia, 349 U.S. 375, 382-83 (1955). At the least, this Court may exercise the same discretion in deciding whether to consider such evidence as could be exercised by a state appellate court.

The issues presented by this case are too important to permit a decision based on an incomplete picture of the history and harsh realities of the California prison system. Immediately at stake are practices which may affect the safety and the very lives of the thousands of inmates and correctional officers in California. Any deci-

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72/ continued

> purpose of making such findings of fact or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make such further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

sion on the merits of this case, no matter how carefully confined to the record described by the Court, will have profound effects on the ability of correctional administrators in other states to deal with the problems of racial violence. This Court has the power to, and amicus submits it is appropriate to, consider all evidence proffered by respondents in the trial court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the California Court of Appeals should be affirmed.

Respectfully submitted,

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